# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1883.

## No. 241.

W. T. WASHER, JACOB DANENHAUER, AND PETER BAECKER, PLAINTIFFS IN ERROR,

vs.

BULLITT COUNTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED APRIL 22, 1881.

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FILED APRIL 27, 1881.

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1 Proceedings of the Circuit Court of the United States for the district of Kentucky, at a regular term begun and held at the city of Louisville on Monday, October 4th, 1880—

Present: the Hon. Jno. W. Barr, judge of the United States for the district of Kentucky.

W. T. WASHER, JACOB DANENHAUER, and PETER BAECKER, plaintiffs,
*vs.*
BULLITT COUNTY, defendant.

Be it remembered that heretofore, to wit, on the 31st day of December, 1879, came the plaintiffs by Messrs. Harlan & Willson, their attorneys, and filed in the clerk's office of said court their petition against the above named defendant, which petition is as follows:

Circuit Court of the United States, sixth circuit and district of Kentucky.

W. T. WASHER, JACOB DANENHAUER, & PETER BAECKER, plaintiffs,
*vs.*
BULLITT COUNTY, defendant.

*Petition.*

2 The plaintiffs, W. T. Washer, Jacob Danenhauer, and Peter Baecker, state that they are citizens of the state of Indiana, and that the defendant, Bullitt county, is a county municipal corporation organized under the laws of and a citizen of the state of Kentucky, and that the matter in dispute in this action exceeds the sum or value of five hundred dollars ($500), and that heretofore, to wit, on the 8th day of July, 1878, in pursuance of and conformity with the authority of certain orders of the Bullitt County Court, the county law-making body of said county, organized in accordance with the laws of the state of Kentucky, the said Bullitt county, through J. W. Ridgway, a commissioner on behalf of said county thereto duly authorized, of the first part, and the plaintiff W. T. Washer, of the second part, made and entered into, executed and delivered a contract in writing of that date by which said Washer agreed and undertook to erect for said county an arched stone bridge across Pond creek, between Bullitt and Jefferson counties, in the state of Kentucky, which bridge was to be built according to plans set out in said contract which is filed herewith as part hereof, marked "Exhibit A," and is referred to for further particulars.

3 By said contract said Bullitt county agreed and promised to pay said Washer for masonry $5.30 per cubic yard, and for cleaning ground, &c., and filling in the embankments, 17¾ cents per cubic yard. There were certain other provisions in said contract not necessary here to be recited. Said contract was also signed by one Horine as a commissioner for Bullitt county.

Subsequently, by consent of all the other parties to said contract, a charge was made in said contract and in some of the specifications not material here to be recited, which was written on the same paper with said contract, and which will be seen by inspection of the contract filed herewith, as aforesaid.

Plaintiffs also state that the plaintiffs Danenhauer and Baecker were sureties for the faithful performance of said contract by said Washer according to its terms and specifications, and the defendant has a copy of the contract executed by the parties in which they were such sureties. The copy of the contract filed by plaintiffs is the one given by said county through its said commissioner to said Washer, and was duly executed and agreed upon by all of the parties thereto, and defendant is called upon to produce the same herein.

Plaintiffs further state that after the execution of said contract, and relying upon its terms and provisions, the plaintiff Washer, at the special instance and request of said Bullitt county, and of the Bullitt County Court, entered upon the work of building of
4 said bridge in accordance with the terms of said contract, and purchased and removed to and near to the site of said bridge, at very great cost and trouble, stone and other material to be put upon said bridge, and horses and carts and tools to be used in the construction thereof, and employed men and proceeded with the construction of said bridge according to said contract.

Plaintiffs further state that thereafter, on the 29 day of August, 1878, the said Washer, for a valuable consideration, by a written endorsement upon said contract, transferred and assigned the said contract, together with all the moneys and profits due or to become due upon the same, to his co-plaintiffs, Jacob Danenhauer and Peter Baecker, which transfer was received, approved, and accepted by said Bullitt county and said Danenhauer and Baecker.

Plaintiffs further state that under said contract said Washer performed labor and services, expended money and furnished materials amounting to the sum of five thousand three hundred and twenty-five dollars and fourteen cents ($5,325.14), to wit, 836 4-10 yards of masonry at five dollars and thirty one-hundredths ($5.30) per yard, four thousand four hundred and thirty-two dollars and ninety-two cents ($4,432.92); $14\frac{3}{4}$ yards stone cut and delivered, fifty-seven dollars and twenty cents ($57.20); 2,748 yards earth at $17\frac{3}{4}$ cents, four hundred and eighty-seven dollars and seventy-seven cents ($487.77); iron bridge, three hundred and forty dollars and seventy-five
5 cents ($340.75); freight on same, six dollars and fifty cents ($6.50), all of which will more fully appear by inspection of the certificate of J. W. Ridgway, a commissioner appointed for said Bullitt county by the Bullitt County Court, and by it duly authorized to contract for and superintend the construction of said bridge and to examine the work done thereon, and to decide whether it was done according to contract, and to accept and receive the same for said county. And the said Ridgway, as commissioner, did examine and approve said work so done, and receive and accept the

same for said county. Said certificate in writing, dated December 24, 1878, is herewith filed as part hereof, marked "Exhibit B," and said county, through its said commissioner, accepted and received said work done under said contract.

Plaintiffs state that under said contract said Washer was to be paid in cash as the work was done, and that according to the terms of said contract there was due to said Washer and his co-plaintiffs, as his assignees, on December 10, 1878, from said Bullitt county said sum of five thousand three hundred and twenty-five dollars and fourteen cents ($5,325.14), which said Bullitt county agreed and promised to pay to said Washer and his said assignees, but notwithstanding its said promise, it has hitherto failed and still fails and refuses to pay the same
6 [or any part thereof except the sum of one thousand and eight hundred dollars ($1,800), leaving a balance due thereon of thirty-five hundred and twenty-five dollars and fourteen cents ($3525.14), but plaintiffs say that of this amount three hundred and forty dollars and seventy-five cents ($340.75) is due to the Smith Bridge Co. for the iron bridge named in the expense account above set forth, and that at the request of said Smith Bridge Co. and by consent of plaintiffs and defendant the said Smith Bridge Co. has agreed to look to Bullitt county for said payment, and plaintiffs consented that Bullitt county should pay said Smith Bridge Company the said sum, leaving a balance due upon the work performed by plaintiff of thirty-one hundred and eighty-four dollars and thirty-nine cents ($3184.39).] That on said 10th day of December, 1878, said defendant, through the presiding judge of its County Court and its county attorney, notified and compelled plaintiffs without plaintiffs' fault to quit work on said bridge as hereinafter set forth, and delivered to plaintiffs through plaintiff Washer the written communication filed herewith, marked "Exhibit C."

Wherefore plaintiffs pray judgment against said defendant in the name of said Washer for the benefit of said Danenhauer and Baecker for said sum of fifty-three hundred and twenty-five dollars
7 and fourteen cents ($5325.14), [subject to the credits above recited, to be satisfied upon the payment of said balance of thirty-one hundred and eighty-four dollars and thirty-nine cents ($3184.39),] with interest thereon at the rate of six per cent. per annum from the 10th day of December, 1878, until paid, together with their costs in this behalf expended.

2. The plaintiffs state that they were proceeding to finish said bridge according to said contract, and were ready and willing to do so, and had made all arrangements necessary therefor, but that upon the 10th day of December, 1878, without any fault of these plaintiffs or either of them, the defendant, Bullitt county, through W. Carpenter, the presiding judge of the county court of said Bullitt county, thereto duly authorized, wrongfully and in violation of said contract, notified plaintiffs to stop work immediately under said contract by a letter written by the county attorney of said county in the

name of said Carpenter as presiding judge of the Bullitt county court, which is filed herewith as aforesaid, marked "Exhibit C," and that plaintiffs were thereby wrongfully forced and compelled, without fault on their part or either of them, to suspend, and did suspend said work.

Plaintiffs state that said order of Bullitt county, through its said officer, compelling plaintiffs to stop said work, was in violation of said contract, and that but for said wrongful interruption of the work under said order and notice from said Bullitt county they would have completed the work and have fully performed the contract; but that by reason of said order and notice and requirements of the defendant they were compelled to stop, and did stop work as aforesaid. And they further state that but for said wrongful interruption and termination of said contract by the defendant plaintiffs would have made a profit in putting up said iron bridge of fifty ($50) dollars; also a profit on thirty-five hundred yards of earth-work not done, of 2¾ cents per yard, or ninety-six dollars and twenty-five cents, ($96.25;) and that by reason of the interruption of said work plaintiff Washer was compelled to make numerous trips to Shepherdsville, and to wait and keep men under him employed and lose their and his own time while awaiting for the final decision of said matter by the Bullitt county court and its consultations with the Jefferson county court; and by reason of said violation of said contract and delay and loss of time the said plaintiffs have been greatly damaged, to wit, in the sum of five hundred dollars, ($500.00.)

8

Wherefore plaintiffs prays judgment in the name of said Washer, for the benefit of his said assignees, against said Bullitt county, for the said further sum of five hundred dollars ($500), and for their costs, &c.

9

HARLAN & WILLSON,
*Attorneys for Plaintiffs.*

Augustus E. Willson, being duly sworn on oath, says that he is one of the attorneys for plaintiffs in the foregoing petition; that each and all of said plaintiffs are absent from the county of Jefferson and from the state of Kentucky, and affiant believes the statements of the foregoing petition to be true.

AUGUSTUS E. WILLSON.

Subscribed and sworn to before me by Augustus E. Willson this 31st day of December, 1879.

SAM'L B. CRAIL, *Clerk.*
By HENRY F. CASSIN, *D. C.*

*Exhibit "A."*

Exhibit "A," referred to in the petition, is as follows:

This contract, made and entered into between the county of Bullitt, in the state of Kentucky, by J. W. Ridgway, com'r, on her be-

half, of the first part, and W. T. Washer, of Perry county, Ind., of the second part, witnesseth:

That the first party has this day contracted with the second party to erect an arched stone bridge across Pond creek, at the *Brauner foundation site*, which said creek is the dividing line between the *counties* of Bullitt & Jefferson, said bridge to be built according to the following specifications:

10 The arch 25 feet span semicercular in form with radius of 12.6, the sheeting to be on booth beds and joints to be cut according to circle, (as shown on plan signed by W. T. Washer,) which is made part hereof. The foundation to be 24 feet wide and 10 feet deep, and to be built six feet high for arch to spring on. The sing stones to have a draft round the face 1 inch wide, headers to be not less than 1.8 long, and stretchers not less than 3 feet, to be all well bounded together, and headers and stretchers so distributed in the wall as to make a good bond, at least 1 header to every 10 feet of wall, and so arraigned that the headers on the next above will be placed between the twoo headers in the course below. All the walls in the wings to batter 1 inch per foot in height, the wing wall to be 6 feet wide and carried up to the height of 24 feet; then the parapett wall to commence at a line with the top of bridge floor to the height of 3.6 with coping cap, as shown in said plan.

The second partey is to keep the fill made as the masonry is being built, so that it will become solid between the walls; the mortar to be twoo parts clear sharp sand and one of cement; the courses to be all well bedded in mortar, all break joints to be at least one foot in length.

11 The bridge to be good and substantial, and the work done in a workmanlike manner, to be accepted by the party of the first part by her commissioners aforesaid, and the second party agrees to build said bridge according to the foregoing specifications at the following rates, which the first party agrees to give when said work is completed and accepted, viz.:

For masonry, five dollars and 30 cents per cubic yard, including cleaning of the ground, &c. For fill in the embankment, 17¾ cents per cubic yard; and the party of the second part, with Jacob Daunhauer and Peter Bacher, his surety, covenants to and with the first party in the penal sum of five thousand dollars, for any loss or damages the first party may sustain by reason of any fault or failure on the part of the second party to perform the covenants and contract herein expressed.

It is understood that the county of Jefferson is to pay her proportionate part for the erection of said bridge, but the first party guarantees the payment of the whole work to the second party.

Witness our hands this 8th day of July, 1878, as commissioners of Bullitt co., Kentucky.

J. W. RIDGWAY.
JAMES HORINE.

It is agreed that a change shall be made in the above specifications as follows, to wit: All reference in the above specification to stone work shall read, stone abutments on the same foundation and the same kind and character of masonry; the abutments shall be 26 feet high and a wrought-iron truss bridge on said abutments, according to the specification, plans, and *strain* sheets filed herewith as part hereof, at the price of ten dollars per foot.

(Signed by) J. W. RIDGWAY.
W. T. WASHER.

TROY, IND., *August 29th*, 1878.

I hereby transfer the within contract, together with all moneys and profits due or to become due on the same, to Jacob Daunhauer and Peter Backe, to be held by and belong to them, until all the notes endorsed by these for me are fully paid and satisfied.

W. T. WASHER.

*Exhibit "B."*

Exhibit B, referred to in the petition, is as follows:

Amount of work done on Pond creek bridge, contract by W. T. Washer.

| | |
|---|---|
| 836 4-10 yards masonry, at $5.30 p. yd | $4,432 92 |
| 14 3-10 yds. cut & delivered | 57 20 |
| 2748 yds. earth, 17¾ | 487 77 |
| Iron bridge | 340 75 |
| Freight on same | 6 50 |
| | $5,325 14 |
| Paid on contract | 1,800 00 |
| | $3,525 14 |

leaving balance due on contract from Bullitt county of thirty-five hundred and twenty-five and 14-100 dollars.

J. W. RIDGWAY,
*Commissioner for Bullitt county.*

Dec. 24th, 1878.

*Exhibit "C."*

Exhibit C, referred to in the petition, is as follows:

Mr. W. T. WASHER.

You are hereby notified that Bullitt county will not be responsible or pay for any work that you may do on the Pond creek bridge after the service of this notice. You are therefore notified to stop all work on said bridge immediately. This stop is taken advisedly, with

a view of compelling Jefferson county to do her part in building said bridge. All work must be immediately stopped, or proper proceedings will be instituted to stop same.

W. CARPENTER,
*P. I. B. C. C.*
F. P. STRAUS,
*County Attorney.*

December 10, 1878.

Upon which petition there issued the following process, viz.:

14 The President of the United States of America to the marshal of the Kentucky district, greeting:

You are commanded to summon Bullitt county to answer, on the first day of the next February term of the Circuit Court of the United States for the district of Kentucky, to be held at the city of Louisville, a petition against it in said court by W. T. Washer, Jacob Dannenhauer, and Peter Baecker, and warn it that upon its failure to answer the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons on the first day of the next term of said court.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Louisville, in the said district, this 31st day of December, in the year of our Lord 1879, and of our Independence the 104.

SAMUEL B. CRAIL,
*C. C. C. K. D.*
By HENRY F. CASSIN,
*Deputy.*

15 *Marshal's return.*

Upon which process the marshal made the following return:

Executed this process on Bullitt county by delivering a copy thereof to W. Carpenter, he being the county judge of said county, at Shepherdsville, Bullitt county, Ky., January 3d, 1880.

R. H. CRITTENDEN,
*U. S. M.,*
By P. S. MORRIS,
*Dep'ty Marshal.*

*Order.*

And afterwards, at a term of our said court, held for its February term, 1880, to wit, on the 23rd day of February, 1880, came the defendant by James Speed, esq., its attorney, and filed its demurrer to the petition herein, which demurrer is as follows:

In the United States Circuit Court, 6th circuit, Kentucky district.

W. T. WASHER, &c., plaintiffs,
*vs.*
BULLITT COUNTY, defendant.

*Demurrer to petition.*

The defendant, Bullitt county, demurs to the petition of plaintiffs, because said petition does not state facts sufficient to constitute a cause of action against this defendant.

F. P. STRAUS, *County Attorney for Bullitt County.*
JAS. SPEED, RODMAN & BROWN & MEYBER,
*For Def't.*

16 And afterwards, on another day of said term, to wit, on the 28th day of February, 1880, came the parties, by their attorneys; and the court being now fully advised of the demurrer to the petition herein, it seems to the court the law is for the defendant. It is therefore considered by the court that the said demurrer be, and the same is hereby, sustained, and the plaintiff may have leave to amend their petition.

And afterwards, on another day of said term of our said court, to wit, on the 3d day of March, 1880, came the plaintiffs, by A. E. Willson, esq., their attorney, and moved the court for a rehearing upon the demurrer herein, and the court not being advised thereof, takes time.

On motion of plaintiffs, by their attorney, three weeks' time is given them in which to file an amended petition herein.

And afterwards, to wit, on the 24th day of March, 1880, came the plaintiffs, by their attorneys, and filed in the clerk's office of said court their amended petition herein, which amended petition is as follows:

*Amended petition.*

Circuit Court of the United States, sixth circuit and district of Kentucky.

W. T. WASHER and others, plaintiffs,
*against*
BULLITT COUNTY, defendant.
Amended petition.

17 The plaintiffs, W. T. Washer, Jacob Danenhauer, and Peter Baecker, by leave of court amend their petition herein, and state that long before the contract sued on was made, the County Court of defendant, duly organized as a County Court, with a majority of the magistrates present, deemed it necessary to erect a bridge at the place and across Pond creek mentioned in petition, and there-

upon appointed a commissioner and notified the County Court of the adjoining county, Jefferson county, and requested it to appoint a like commissioner, which it did; and the commissioner so appointed met with the Bullitt county commissioner at the place proposed for erecting the bridge and agreed on a plan for the same, and contracted for the erection thereof, and under said contract the erection of said bridge was begun and the Brauner foundations mentioned in petition and in the contract filed with petition were built, but, at that point, the work was stopped; that before work was begun under the contract mentioned in petition, the owners and occupants in possession of the lands approaching the said bridge on both sides of Pond creek appeared in open County Court, and relinquished of record the right of way to and across said bridge, and that said Bullitt county,
18 before work was begun under said contract, had and held, and has since held and still holds in possession, said right of way for the public road to and across said bridge over said lands, and did so own it at the time when said contract here sued on was made; and thereafter, before the said contract was made, the County Court of Bullitt county, being composed of the presiding judge and a majority of the justices thereof, appointed commissioners and notified the Jefferson County Court thereof and requested it to appoint like commissioners to contract for said bridge, which said Jefferson County Court did; and said commissioners met at the place proposed for erecting said bridge and at the place mentioned in the said contract, but could not and did not agree upon a plan for erecting said bridge nor contract for the erection of said bridge; that said Jefferson County Court did not refuse to appoint commissioners; that thereupon the County Court of Bullitt county, the defendant, composed of the county judge and a majority of the justices of said county, decided that it was necessary to erect said bridge, and having exhausted all means provided by statute for securing the aid of Jefferson county in building said bridge, decided to erect said bridge; and thereafter, to wit, on the 16th day of July, 1877, the Bullitt County Court, composed and organized of its presiding judge and a majority,
19 to wit, all of the justices of the peace of said county, met and entered of record the following order, to wit:

"It is ordered that 600 dollars be appropriated to be paid out of the county levy of Bullitt county, for the purpose of erecting a bridge across Pond creek, at the Brauner foundations site, to be levied at the November Court of Claims 1877, and J. W. Ridgway, the commissioner herein, is directed to report plans and specifications for erecting said bridge, and also to report any bids that may be offered, and the amount of such bids, if any are made. W. Carpenter, county judge, is authorized to receive bids and accept or reject same as he may think proper, looking to the interests of Bullitt county and Jefferson county in the matter."

And thereafter, in pursuance of said order, said Commissioner Ridgway reported plans and specifications for erecting said bridge, and the bids that were offered and the amount of said bids, and

among others the bid of plaintiff Washer, and thereupon W. Carpenter, the county judge named in said order, received the bids so reported, and accepted the bid of said Washer. That thereafter, to wit, on the 19th of November, 1877, the county court of Bullitt county entered of record the following order, to wit:

"It is ordered that James W. Ridgway be appointed commissioner on behalf of Bullitt county to contract for the building of a bridge across said creek at the place heretofore selected as a site, and
20 he will report to court on the matter," which order was entered by said W. Carpenter, as county judge.

That the bridge intended by said orders is the same bridge named in the contract sued on hereinbefore mentioned, and thereupon and in pursuance of said orders and in conformity with the terms, provisions and conditions of said bid of Washer, reported by said commissioner and received and accepted as aforesaid by the county judge, W. Carpenter, said Ridgway, as commissioner for defendant, executed and delivered the contract sued on, and thereupon plaintiff Washer, under said contract entered upon the performance of the work therein contracted for, and performed the work as shown by the petition; that during the progress of the work it was well known by the Bullitt county court and by the said judge and a majority of the justices thereof that said Washer was doing said work under said contract, the terms and tenor of which were well known to said judge and justices, and that thereafter, to wit, on November 18, 1878, the Bullitt county court, composed of the judge of the county court and a majority of the justices of the peace of Bullitt county, with the full knowledge that the work and services set forth in the petition had been done under said contract, recognized and
21 ratified said contract by the following orders, which were then made and entered of record, to wit:

"It is ordered that a tax of 5 p. c. upon each one hundred dollars worth of taxable property of Bullitt county be levied for the purpose of paying for the erection of a bridge across Pond creek, to be collected by the sheriff of Bullitt county as other revenue tax is collected, the amount of property to be ascertained from the assessor's books to be returned for the year 1879, and the tax to be collected for said year.

"It is ordered that Jacob Danenhauer and Peter Baecker, assignees of W. T. Washer, contractor to build a bridge across Pond creek, be allowed the sum of twelve hundred dollars ($1,200.00) to be paid out of the 5 p. c. levy this day made."

Plaintiffs state that by said order said Bullitt County Court levied a tax of five cents on each one hundred dollars of taxable property in said county to pay for the erection of the bridge, and that the bridge named in all of said orders of said Bullitt County Court quoted above was the same bridge mentioned in the petition, and the Danenhauer and Baecker are the plaintiffs herein, and said order was made because of and in consideration of the contract sued on.

Plaintiffs state that said bridge was necessary for the use of
22 the people and travel of Bullitt county; that said proceedings had and orders and contract so entered into by defendant were valid and binding upon it. Plaintiffs when they filed the petition believed and alleged on information that defendant had assumed the cost of the iron bridge, $340.75, but defendant's officers now deny this, and plaintiffs withdraw their allegations in the following words of the original petition:

"Or any part thereof, except the sum of one thousand and eight hundred dollars ($1,800), leaving a balance due thereon of thirty-five hundred and twenty-five dollars and fourteen cents ($3,525.14); but plaintiffs say that of this, three hundred and forty dollars and seventy-five cents ($340.75) is due to the Smith Bridge Co. for the iron bridge named in the expense account above set forth, and that at the request of said Smith Bridge Co. and by consent of plaintiffs and defendant the said Smith Bridge Co. has agreed to look to Bullitt county for said payment, and plaintiffs consented that Bullitt county should pay said Smith Bridge Co. the said sum, leaving a balance due upon the work performed by plaintiff of thirty-one hundred and eighty-four dollars and thirty-nine cents ($3,184.39)."

Plaintiffs also withdraw their allegations in the following words of the petition, viz.:

23 "Subject to the credits above recited to be satisfied upon the payment of said balance of thirty-one hundred and eighty-four dollars and thirty-nine cents ($3,184.39)."

Plaintiffs strike out figure "2" from the second paragraph of petition, and claim in one cause of action damages for all of the wrongs and defaults committed by defendant against plaintiff set out in their pleadings in this action.

Plaintiffs withdraw from the original petition their allegations in the following words, viz: "And by reason of said violation of said contract and delay and loss of time said plaintiffs have been greatly damaged, to wit, in the sum of five hundred dollars ($500)," and strike out of petition the words "wherefore plaintiffs pray judgment against said Bullitt county for said further sum of five hundred dollars ($500) and for their costs, &c."

Plaintiffs state that the defendant, notwithstanding said proceedings and its agreement in said contract, has wrongfully and in violation of its said agreement and undertaking failed and refused to perform its said contract and to pay plaintiffs for the work done thereunder, by reason whereof plaintiffs have been greatly damaged, to wit, in the sum of five thousand three hundred and twenty dollars and fourteen cents ($5,325.14).

Wherefore plaintiffs pray judgment against the defendant
24 for five thousand three hundred and twenty-five dollars and fourteen cents ($5,325.14) and for their costs, &c.

HARLAN & WILLSON,
*Att'ys for Pl'ffs.*

Augustus E. Willson, on oath, says that he is one of the attorneys for W. T. Washer, Jacob Danenhaur and Peter Baecker, plaintiffs in the foregoing amended petition; that they are all of them absent from the district and state of Kentucky, and that he believes that the statements of the foregoing amended petition are true.

AUGUSTUS E. WILLSON.

Subscribed and sworn to before me by Augustus E. Willson, this 24th day of March, 1880.

CLARENCE E. WALKER,
*Notary Public, Jefferson co., Ky.*

And afterwards, to wit, on the 19th day of April, 1880, came the defendant and filed its demurrer to the amended petition herein, which demurrer is as follows:

*Demurrer to Amended Petition.*

In the United States Circuit Court for the 6th circuit & Kentucky district.

W. T. WASHER & others, plaintiffs,
*vs.*
BULLITT COUNTY, defendant. } Demurrer.

The defendant, Bullitt county, demurs to the amended petition filed March 24th, 1880, and for grounds of demurrer says:

25 First. That the said amended petition does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore it prays judg't, &c.

F. P. STRAUS,
*County Attorney.*
JAMES SPEED &
RODMAN & BROWN,
*Att'ys for Def't.*

*Order.*

And afterwards, at another term of our said court, to wit, on the 9th day of October, 1880, the court being now fully advised of the demurrer to the amended petition, it seems to the court the law is for the defendant. It is therefore considered by the court that said demurrer be and the same is hereby sustained.

And the plaintiffs saying nothing further, it is considered by the court that the plaintiffs take nothing by their petition, and that the defendant go hence without day and recover of the plaintiffs its costs herein expended.

And thereupon, the plaintiffs pray an appeal to the Supreme Court of the United States, which is granted.

*Opinion of Court.*

The opinion of the court in deciding the demurrer is as follows:

Circuit Court of the United States for the district of Kentucky.

26 WILLIAM T. WASHER et al. }
*vs.*
BULLITT COUNTY. }

I see no reason to change the views intimated upon the argument. While County Courts have a general authority under chap. 28, art. V, sect. 1, to erect bridges, I think the provisions of ch. 94, art. 1, secs. 36 and 37, must be pursued when it is proposed to carry the bridge into another county. By sec. 37 the Circuit Court of Jefferson county might not only have compelled the appointment of a commissioner, but "the erection of such bridge" if it were deemed advisable. But of what use would it be to authorize one county to build a bridge into another if that other refused to open a road to connect with it?

Bullitt co. could not bind Jefferson to pay its proportionate share, and the County Court of Bullitt could not levy more than its share from its tithables. The attempt to guarantee the payment of Jefferson's share was clearly unauthorized.

The case is practically controlled by that of the Nelson Co. Ct. *vs.* Washington Co. Ct., 14 B. Mon., 92.

DISTRICT OF KENTUCKY.

27 I, Sam'l B. Crail, clerk of the Circuit Court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 27 pages, this included, contain a true and complete transcript of the record of the proceedings had in the case mentioned in the caption hereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 20th day of October, A. D. 1880.

[SEAL.] SAM'L B. CRAIL, *Clerk.*

28 UNITED STATES OF AMERICA, } *ss.*
*District of Kentucky.* }

The President of the United States of America to the judges of the Circuit Court of the United States for the Kentucky district, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court before you, between W. T. Washer, Jacob Danenhauer, and Peter Baecker, plaintiffs, and Bullitt county, defendant, a manifest error hath happened to the great damage of the said W. T. Washer, Jacob Danenhauer, and Peter Baecker, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly cor-

rected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the third Monday of our October term, 1880, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, chief justice of the Supreme Court of the United States, and the seal of the said court at Louisville, in said district, this fifteenth day of October, A. D. 1880, and of the Independence of the United States the 105th.

SAMUEL B. CRAIL,
*C. C. C., K. D.*

Allowed by
[SEAL.] JNO. W. BARR,
*Judge, &c.*

29 UNITED STATES OF AMERICA, *District of Kentucky*, } *ss.*

To Bullitt county, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington on the third Monday of October, inst., pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the said district of Kentucky, wherein W. T. Washer, Jacob Dauenhauer, and Peter Baecker is plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, chief justice of the Supreme Court of the United States, this fifteenth day of October, in the year of our Lord 1880, and of our Independence the 105th.

[SEAL.] JNO. W. BARR,
*Judge.*

30 Executed, this 16th day of October, 1880, by delivering a true copy of the within citation to James Speed, esq., the attorney of record of the within named Bullitt County, the defendant in error.

R. H. CRITTENDEN,
Marshal's fee, $2. *U. S. Marshal, district of Kentucky.*

31 Supreme Court of the United States.

W. T. WASHER and others, plaintiffs in error,
*against*
BULLITT COUNTY, defendant in error.

Know all men by these presents that we, W. T. Washer, Jacob Danenhauer, Peter Backer, and Herman Baertich, of the county of Perry and state of Indiana, are held and firmly bound unto Bullett county, state of Kentucky, in the sum of two hundred dollars, to be paid to the said Bullitt county and its successors, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated this 23 day of Oct., A. D. 1880.

Whereas the above named W. T. Washer, Jacob Danenhauer, and Peter Backer have prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered in the above entitled cause by the Circuit Court of the United States for the sixth circuit and district of Kentucky, sitting at Louisville—

Now, therefore, the condition of this obligation is such, that if the above named Washer, Danenhauer, and Backer shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall
32 be void; otherwise of full force and virtue.

W. T. WASHER. [SEAL.]
JACOB DANENHAUER. [SEAL.]
PETER BACKER. [SEAL.]
H. BAERTICH. [SEAL.]

Sealed and delivered by W. T. Washer in presence of—
S. F. LANDES.

STATE OF INDIANA, *Perry county*, } *ss.*

Personally appeared before me, Sam. K. Connor, a notary public in and for said county and state, Jacob Danenhauer, Peter Backer, and Herman Baertich, whose names appear to the above bond, and acknowledged the signing and sealing of the same to be their voluntary act and deed, for the uses and purposes therein named.

Witness my hand and seal this 23d day of Oct., 1880.

[SEAL.] SAM. K. CONNOR,
*Notary Public.*

STATE OF INDIANA, *Perry county*, } *ss.*

I, John T. Patrick, clerk of the Circuit Court in and for said county and state, do hereby certify that the signors of the above and foregoing bond are amply good for double the amount thereof, as I verily believe from the best knowledge I can obtain.

In testimony whereof I hereunto set my name and affix the seal of said court at Cannelton this 23 day of October, 1880.

[SEAL.] JNO. T. PATRICK, *Clerk.*

(Indorsement on cover:) Kentucky; C. C. U. S. 241. W. T. Washer, Jacob Danenhauer and Peter Baecker, plaintiffs in error, *vs.* Bullitt County. Filed 27th April, 1881. 32 pages.

110-538

# Supreme Court United States.

OCTOBER TERM, 1882.

W. T. WASHER, JACOB DAUENHAUER, and PETER BAECKER, Plaintiffs in Error,

VERSUS

BULLITT COUNTY.

No. 241.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

## BRIEF FOR PLAINTIFFS IN ERROR.

BY AUGUSTUS E. WILLSON.

JAMES HARLAN, of Counsel.

PRINTED BY THE COURIER-JOURNAL JOB PRINTING COMPANY.

# Supreme Court of the United States.

OCTOBER TERM, 1883.

W. T. WASHER, et al, Plaintiffs in Error,
VERSUS
BULLITT COUNTY.
No. 241.

## BRIEF FOR PLAINTIFFS IN ERROR.

### STATEMENT OF THE CASE.

This action was brought in the Circuit Court of the United States for Kentucky, by plaintiffs in error, citizens of the State of Indiana, against Bullitt County, of the State of Kentucky, to recover $5,325.14 damages for breach of a contract between Bullitt County and plaintiff Washer, by which Washer agreed to build a bridge for Bullitt County across Pond creek, the boundary between Bullitt and Jefferson Counties, and the County agreed to pay him certain prices per cubic yard for masonry and "fill," and per lineal foot for the iron bridge.

Washer had done $5,325.14 worth of work on the bridge, which was accepted and approved by the proper officer of the county, when at the demand of the county, without his fault, the work was stopped, and the county refusing to pay for the work done, this action was brought.

Plaintiffs Dauenhauer and Baecker were Washer's sureties for

the performance of his contract, and subsequently took an assignment of it to secure them on notes endorsed by them for him.

The Circuit Court sustained a general demurrer of defendant to the petition and gave plaintiffs leave to amend, and under that leave the amended petition was filed (R. 8.) and the defendant demurred to the amended petition on the ground that it did not state facts sufficient to constitute a cause of action against defendant.

The Circuit Court sustained this demurrer, and, plaintiffs saying nothing further, entered judgment that the plaintiffs take nothing by their petition and that the defendant go hence without day and recover of plaintiffs its costs. (R. 12.)

The writ of error in this action is sued out to correct that judgment.

The record is a short one and it will not facilitate the consideration of the case to recite the allegations of the petition as amended the sufficiency of which is in question.

The pleadings and contract filed as an exhibit with them, disclosed the fact that the contract was for building a bridge across Pond creek, the boundary between Bullitt and Jefferson Counties, and the question as to the power of the County to make such a contract to pay the whole cost of a bridge across the County boundary, was raised by the demurrers, and was the only question which was considered in the Court below. The Circuit Court held *pro tem*, by his Honor, District Judge Brown, of Michigan, decided against the power of the County to make such contract, sustained the demurrers, and dismissed the action. (R. 12–13.)

## ERRORS ASSIGNED.

1. The Circuit Court erred in the judgment sustaining the demurrer to the amended petition and directing that the

plaintiffs take nothing by their petition, and that the defendants go hence without day and recover of the plaintiffs its costs.

2. The Circuit Court erred in holding that the Bullitt County Court had not the power to bind the County by the contract to build a bridge into another County.

## POINTS OF LAW.

1. "THE POWER TO BUILD SUCH A BRIDGE IS GIVEN BY THE FOLLOWING SECTION OF THE GENERAL STATUTES.

"§1. *County Courts have jurisdiction to* lay and superintend the collection of the County levy, *erect* and keep in repair *necessary public* buildings, *bridges*, and other structures, *and superintend the same;* regulate and control the fiscal affairs and property of the County; make provision for the maintenance of the poor and provide for the good condition of the public highways *in the County; and to execute all of its orders consistent with law and within its jurisdiction.*" (Gen'l. Stat., p. 305.)

This statute gives the County Court jurisdiction *to erect necessary public bridges* and superintend the same and to execute all of its orders consistent with law and within its jurisdiction.

The amended petition alleges (R. 8., *et seq.*) that the Bullitt County Court being duly organized, with a majority of the Magistrates present, deemed it *necessary* to erect the bridge and afterwards the full County Court appointed a commissioner to report plans, specifications, and bids for erecting the bridge, and authorized the County Judge to receive and accept or reject bids, as he might think proper.

That the commissioner reported such plans, specifications, and the bids offered, including plaintiffs' bid, and the County Judge received them, accepted Washer's bid, and entered of record in the County Court, an order appointing the same com-

missioner, on behalf of Bullitt County, to contract for the building of the bridge; and in pursuance of the said orders and bid the commissioner executed, and delivered for defendant the contract sued on, and that under this contract the work mentioned in petition was done. That the County Court composed of the Judge and a majority of the Justices of Bullitt County afterwards ratified this contract, levied a tax to pay for the building the bridge under it, and allowed Washer's assignees, his co-plaintiffs, $1,200, to be paid out of the County levy, when it should be collected.

That the bridge was necessary for the use of the people and travel of Bullitt County and said proceedings were valid and binding on defendant, and that under this contract Bullitt County has received and holds and refuses to pay for $5,325.14 worth of Washer's work and materials.

The words, "*necessary public bridges,*" are not limited by the statute to bridges *wholly within* the County. And unless other statutes or the nature of County powers forbid us in case of a bridge crossing a boundary, to give these words their common signification, they are broad enough to cover any public bridge necessary for the use of the County, and the pleadings allege that this bridge was necessary and was determined by the County Court to be a "*necessary public bridge.*"

In view of the fact that streams are very often boundaries in Kentucky, and that bridges over such streams are very often indispensable to one county, and of comparatively little or no value to the adjoining county, it is reasonable to believe that the Legislature, in giving this general power to build bridges, had in view necessary public bridges across boundary streams. And it has shown that it did, in fact, have boundary bridges in view when adopting the General Statutes, by the very provisions relied on by defendant and quoted below, providing a method of securing the building of bridges across boundaries at

the expense of both counties in proportion to their respective tithables, when both County Courts agree; or when the Circuit Court of the County whose County Court refuses, requires the refusing County Court to show cause why it shall not help erect the bridge. (General Stat., §§ 36, 37 and 38, p. 767, *infra.*)

To hold that the words "*necessary public bridges*" do not include any bridge across a boundary, leaves every County without power to build any, even the most necessary bridge across a boundary, unless both Counties wish it, or the Circuit Court of the County refusing, decides to require it to help. And the County and Circuit Courts of the second County have a right to refuse to contribute, in the proportion of their County's tithables, whenever they think the bridge is not necessary to their County in substantially the same proportion.

The sites and immediate approaches at both ends of the bridges across boundaries have, as far back as I find cases bearing on the subject, been under the common care of both Counties and, therefore, as to bridge purposes, may, without violence to either's rights, be considered as being in either County. The amended petition alleges that before work was begun under the contract the right of way over the lands approaching the bridge *on both sides of Pond creek* was relinquished of record by the owners of the lands in open County Court, and that Bullitt County, before the work began, and when the contract was made, had, and still holds and owns the said right of way for the public road to and across the bridge. The ownership of this right of way would give Bullitt County the same right to work on the land covered by it which any other owner of an easement in land has, and would bring such easement and land covered by it within the jurisdiction of the Bullitt County Court for this purpose.

In *Rex and Devon*, 14 East, 477, the County of Dorset was

required to keep in repair *a bridge running into the County of Devon and 300 feet roadway in Devon.*

In *Rex vs. W. Riding of York* 7, East 588; Lord Ellenborough cited the response of Knivet, J., to the Abbott, who pleaded that he was only responsible for two arches of the bridge.

"We intend that you are bound to repair *the bridge and the highway adjoining the one end of it and the other, although the soil may be in another;* so that the easement shall be saved to the public."

A more complete citation of the Abbott's case in same case in 5 Taunton, 294, Lord Eldon, Chancellor.

The fact that the north end of this bridge rests in Jefferson County, does not prevent it from being a necessary bridge for the public use of Bullitt County people and travel. While the fact that Bullitt County is a poor, sparsely settled County, with a small amount of tithables, and Jefferson County is a rich County including the city of Louisville, with an immense amount of tithables, makes it improbable that Jefferson would or could be required by its Circuit Court to help pay for the bridge in the proportion of its tithables to Bullitt's. It is evident that a bridge toward the city may be of the gravest necessity to Bullitt County. It may be more necessary than any other bridge of that County. Suppose a case of an island County or one with a very long, deep water boundary, would it be reasonable, in the face of the comprehensive words of the Statute, and of the manifest public necessity, to incline to limit the words "*necessary public bridges*" to bridges *wholly within* the County?

It seems not, and this impression is fortified by the fact that in the same sentence, in the next to the last of a series of clauses separated by semi-colons, which grant a series of powers to the County Court, the power "to provide for the good condition of the public highways," is limited, by adding the words "*in the county.*" It seems to me that if the Legislature had

intended to limit the bridge building-power to "necessary bridges *in the county*," it would have been as much more likely to use these words after "*bridges*," than after "*roads*," as counties are more likely to carry a bridge, started on their own side of the boundary, across it, than to work on the road in the other county. Bridges and highways are the only things mentioned in that section which are likely to be built across the boundary, and the statute limits the power as to "roads" to "roads *in the County*." There is an evident reason for making the difference. A road may be passable, even if not properly made in the other county or across the line, but a bridge must, of necessity, go clear across, or be no bridge. The fact that "highways" and "bridges" are in separate clauses, when it would have been shorter and plainer to put both in the same clause, indicates that this difference in the purpose of the Legislature required them separated as in this statute.

My study of the history and origin of the County organization, and every line of references in the Digests which seemed likely to throw any light on the subject, satisfies me that no incident of their origin or history, no law nor custom of county-government, no condition in the nature of their organization or its purposes or uses, no reported decision, and no treatise gives any support to defendant's position, that the words "necessary public bridges" can not include "necessary public bridges" across boundary streams.

In *Granby vs. Thurston*, 23 Conn., 416, the court held to be constitutional a statute requiring the town of Granby to bear the *whole* expense of keeping up a bridge across the boundary river to the adjoining town of Thurston. It seems to me that this would not have been so decided if the Court had believed that the fact of its crossing a boundary stream settled that it was not a Granby bridge. To tax Granby for the whole bridge implied that it was considered a proper town-charge, properly

~~a Granby bridge. There is a trace of the same idea in Shaw vs. Dennis, 10 Ill., 405.~~

Even in the absence of the clear authority of the Kentucky statute, the right of the County to build such a bridge would be implied from the necessity of the case. Public convenience requires that either county must have power to build such bridges to enable its people and travel to pass beyond it. Nor is the fact that it may benefit the neighbor county a reason against the power being implied. The question is, whether it is "*necessary*" to the county making the contract.

I have been able to find only one case (Gilman vs. County of Contra Costa, 5 California 426) which nearly approaches that at bar, or in which the power of a county or town to build a bridge across a boundary was ever raised, and that case was not directly analogous, because it was a bridge from the city of Oakland, in Contra Costa County, across a creek wholly within the city limits, out into the county. In that case plaintiff sued the county on a contract for the erection of the bridge, which was evidently wholly within the city, touching the county only at the outer end. The lower court decided against plaintiff on the ground that the bridge was *in the city* and *not a county bridge*, and therefore the contract was not authorized, under the limited powers of a *quasi* corporation like the County.

But the Supreme Court of California reversed the case, and said:

"It appears the Southern line of the creek is the dividing line between the city of Oakland and the remainder of Contra Costa County. * * * In such a case I think *the rule for public convenience, would admit the power of either jurisdiction to have a bridge constructed to enable the citizens of its own territory to pass beyond it.*"

The second point in respondents' argument in that case showed that in California the power thus held to exist in a

County, was implied as an incident to the power to build roads, and without any statutory grant of power as in the Kentucky Statute.

Though Oakland is in Contra Costa County, it is evident from the report of this case that the city was, under the California laws, for purposes of roads and bridges, a distinct jurisdiction from the County. The Court speaks of each as having "its own territory," and as *passing beyond it* in going from one to the other.

The material point of the decision is that either of two distinct, adjoining, *quasi* corporations, has power to build a bridge to enable its citizens to pass out of its territory even though the bridge reaches into, or as here is wholly within the adjoining district, only reaching *to* the contracting district.

The case at bar presents a much stronger case for the contract than the Gilman case. Here the Statute expressly authorizes the erection of "necessary public bridges," and the California case shows that the nature of Counties does not require us to imply a limitation to bridges "wholly in the County," but on the contrary, a bridge wholly out of the County, only touching it, might be authorized by this grant of jurisdiction. No useful public policy demands the limitation contended for. On the contrary, it would be an obstacle to building necessary bridges. Powers such as are given in this bridge building general law, in plain comprehensive words, for useful public ends, are favored by public policy and the Courts.

The reason of convenience in territorial division, which ends County jurisdiction in most matters, exactly at the County line, does not apply to bridges crossing out of a County. A bridge must be one structure, and must be in both Counties, and when one County needs it and the other does not, the one which needs it must have the power, if we can find it, as here in the Statute, to build the whole bridge even if the north end does land in the adjoining County.

If we deny this power, an enterprising County can be isolated by ignorant, slothful Counties surrounding it, nor would the power of the Circuit Court referred to above, obviate this, for that could not reach the case of a bridge not necessary, or not deemed necessary by the Circuit Court of the neighbor County.

Counties have all of the powers necessary to do a County's business, such as Counties have always done, or the Statutes have directed, just as banks can do bank business, and railroads their business. *Suum cuique.*

2. SECTIONS 36 AND 37 OF CH. 94, ART. I, OF THE GENERAL STATUTES OF KENTUCKY (p. 767) ARE NOT INTENDED TO RESTRICT NOR LIMIT SECTION 1, CITED ABOVE, BUT ARE SUPPLEMENTARY TO AND IN AID OF THAT STATUTE.

These sections read:

"§ 36. When the County Court of any County shall deem it advisable to erect a bridge or causeway over any place between that and an adjoining County, the court shall appoint a commissioner, and notify the court of the adjoining County thereof and request the latter to appoint a like commissioner; and it shall be the duty of the court so requested to appoint such commissioner. The persons so appointed shall meet at the place proposed for erecting the bridge or causeway, and agree on a plan for the same, and contract for the erection thereof; and each of said County Courts shall levy the cost of such work on its County, in proportion to the number of tithables in each County."

"§ 37. When the County Court of one County shall think it expedient to build a Bridge or Causeway, and shall appoint a Commissioner on its part as provided in the preceding section, and the court of the adjoining County shall refuse to appoint a Commissioner, or when the County Court of one County shall deem it necessary to open a road to the County line for the convenience of traveling to some place or another, and the County Court of such other County shall refuse to continue the road through such County, the Circuit Court of the County refusing, may issue a writ of man-

damus to the County Court to show cause why an order shall not be entered up directing the appointment of the Commissioner, and the erection of such bridge or causeway or the opening of the road."

"§ 38. When the mandamus is returned, the Circuit Court shall hear and consider such evidence touching the matter, as either party may adduce, and shall either dismiss the proceeding or award a peremptory mandamus, as may seem proper."

If these two sections are mandatory, if they require *every* County Court which desires to build a bridge over a boundary stream to proceed as laid down in the two sections, the amended petition shows that the Bullitt County Court did comply with their requirements.

Section 36 provides that the County Court shall appoint a Commissioner, notify the Court of the adjoining County, and request the latter to appoint a like Commissioner, both of which things are alleged to have been done (R. 8–9); that the latter County shall appoint such Commissioner, the persons so appointed shall meet at the place proposed for erecting the bridge and agree on a plan and contract for the erection thereof, etc.

The Statute was strictly followed by both Courts appointing Commissioners, and by the persons appointed meeting at the place proposed for erecting a bridge, but at that point, the proceedings were brought to an end, because the Commissioners could not, and did not, "agree on a plan for the same and contract for the erection thereof."

Section 37 provides, that when a County appoints a Commissioner, as provided in section 36, *and the Court of the adjoining County shall refuse to appoint a Commissioner, then* the first County may petition the Circuit Court of the latter County to require the County Court to show cause why it shall not order the appointment of a Commissioner and erection of a bridge.

The only case in which the first County can ask the Circuit Court to interfere, or use the powers given in section 37, is, as

expressly declared in section 37, when the first County determines to build the bridge and appoints a Commissioner, "*and the Court of the adjoining County shall refuse to appoint a Commissioner.*"

The amended petition shows that this contingency, which alone could give the Circuit Court of Jefferson County jurisdiction to entertain a petition from Builitt County, under Sec. 37, never occurred, but that the Jefferson County Court did appoint the Commissioner. (R. 9.)

Section 37 does not authorize the Jefferson Circuit Court to interfere if the Jefferson County Court appoints a Commissioner. If then these sections require every county building a bridge over a boundary to follow their provisions, the pleadings show that it was done. These special provisions, to enable Bullitt to compel Jefferson to help, had been followed, their power exhausted, and if that bridge was a "necessary public bridge" for Bullitt County, it was equally necessary for it to build it alone, as the law gave no further power to make Jefferson help.

If sections 36 and 37 limit the section 1, quoted above, it is evident that they provide the only contingency in which that limitation must apply, and that, after the proceedings in this case, those sections (36 and 37) can not, and do not, apply to this bridge.

Defendants insist that Sections 36 and 37 abrogate the Sec. 1, as to bridges over boundaries. This violates the established rule of construction that we are to try to give effect, to all these sections if possible, and incline against a construction which makes one inconsistent with the other. (Adams vs. Ashby, 2 Bibb, 97.) These three sections, when read together in the order in which they occur, provide that each County Court shall have power to erect necessary public bridges, and shall further have power, in case of any such bridge, which they are given this power to erect, crossing a boundary, to require the next

county to appoint a Commissioner, and if the two Commissioners agree on plans and contract for the bridge, to also require the next County to help pay for it, in the proportion fixed by the Statute.

This construction gives all three full effect, interpreting the two last sections, as their coming after the first indicates they are intended, as something which the first did not provide for, something further, in aid of and to supplement the general powers in the first section, a means not given in the first section, of compelling the second county to share the expense if it will be proportionately benefited by the bridge. It was reasonable to expect that the two latter sections would result in building some necessary bridges, which otherwise would not be built, as well as help to correct the tendency of some counties to get such improvements at their neighbor's expense.

Section 1 provides for *all* "necessary public bridges" whether needed by one County or two, but under it, without sections 36 and 37, an enterprising County with backward neighbors must build all the boundary bridges alone, even if they are highly beneficial to the others. Sections 36 and 37 do not pretend to provide for a necessary public bridge across a boundary, *which only one* of the Counties needs. Ought we then to so construe section 1 as to leave no power to build such a bridge?

Defendant's construction of sections 36 and 37 would not be objectionable if we could assume that all bridges across boundaries would be necessary to both Counties, and that both Counties would always appoint commissioners, and that the commissioners would always agree on plans and contract to build necessary public bridges, for in that case sections 36 and 37 would apply to all such bridges authorized under section 1, but evidently we can not so assume, for the case at bar presents a case where the commissioners did not agree, and, if defendant is right, a

case in which the law gives no power whatever to build the bridge. A common instance of a bridge or a road necessary to one county and useless to its neighbor is where an important road, very necessary to one County, runs along its boundary and is forced across the boundary, by some obstacle, for a short distance, and then returns to the county; such a road with a bridge across a boundary stream, might be absolutely useless to the County thus temporarily crossed into. Can we be asked to so construe these sections 36 and 37, that such a road and bridge can not be built?

The Kentucky Court of Appeals, in Garrard County Court vs. Boyle County Court, 10 Bush 208, strongly confirms plaintiff's construction of the scope of sections 36 and 37 in this language:

"Adjoining Counties being *often* jointly interested in making such improvements, as building bridges, making roads, etc., *some legislation was required to enable* the legally constituted authorities of *the two* to co-operate in the construction of improvements in which they had a common interest.

The spirit and meaning of the enactment passed to accomplish this purpose is, that *when both Counties* deem it expedient to make such an improvement, a Commissioner shall be appointed to each and the appointment of a Commissioner by one County with notice of that fact to the other *is but an invitation to the latter to unite* with the former in the undertaking.

*When the County Court of the County notified refuses to comply with the request* or unite in the work, the Circuit Court of that County is made the arbiter between the two, with authority to determine from the facts adduced, *whether or not* the County refusing to act shall aid in the erection of the bridge.

It is true the language of the 33d section is . . . . that when the County Court of one County shall deem it advisable to erect a bridge, etc., the court *shall* appoint a commissioner.

Although the language . . . . . would imply that a demand made by the one should be complied with by the other, still the Legislature gave to this language, its proper interpretation in the two succeeding sections . . . with reference to the subject."

(Section 33 of the Revised Statutes is the same as section 1, of the General Statutes referred to *supra*.)

"Legislation *to enable*" not require "*the two to co-operate*" expresses our construction of sections 36 and 37, and the opinion evidently construes the analogous provision, although in mandatory form, to be directory. And this brings us to our next point

3. THAT SECTIONS 36 AND 37, WHEN READ WITH SECTION 1, AND TAKEN TOGETHER AND READ WITH A VIEW TO THEIR SPIRIT AND PURPOSE ARE EVIDENTLY NOT MANDATORY, BUT DIRECTORY.

They evidently do not require a County which wishes to build a bridge across a boundary, alone, at its own expense, to go through the steps of 36 and 37 before it can exercise its general power under section 1.

In the Court below, defendant relied on *Nelson County Court vs. Washington County Court*, 14, B. Monroe, 92 (Ky.). That case did not present for decision any question involved here. The power "*to erect necessary public bridges*" was not mentioned in it, nor did it decide, that one County could not contract to pay the whole expense of a bridge across a boundary stream.

It did involve a question under Statutes of the same purport as sections 36 and 37. Washington County attempted under those Statutes to compel Nelson County to help build a bridge across a boundary.

It applied to the Nelson County Court to appoint Commissioners to contract for the bridge, and being refused, applied to the Nelson Circuit Court to require the Nelson County Court to show cause why it should not appoint Commissioners, etc. Nelson County responded. The Circuit Court overruled the response, but instead of ordering the Nelson County Court *to appoint Commissioners and erect the bridge*, which the Statute gave the Circuit Court jurisdiction to do, it made an order not author-

ized at all by the Statute, requiring the County Court to levy $2,500 tax for the bridge, without directing the appointment of any Commissioners to make plans, or contracts, or fix proportions of tithables, or of the amounts each should pay.

All that was decided in that case was, that this judgment was erroneous and unauthorized, and that if Washington County desired to use these Statutes to compel Nelson to help build the bridges, Washington itself must, on its part, do what the Statute required of it and proceed in the manner provided.

Defendant relied especially on the following passage in the opinion:

"Mandamus . . . . should have been awarded, not to compel Nelson to do what she had not been asked to do, and what could not have been lawfully required of her, *to tax* . . . . . to build a bridge, before a joint commission had been appointed, but to . . . . . compel the Nelson County Court to appoint three persons to confer with three others appointed by the Washington County Court . . . . . for, as the law is understood by this court, *until such joint commission is constituted, to act in obedience to the requisitions of the Statute, neither of the Counties are bound, nor can either be compelled to tax their citizens in any way, to raise money to build the bridge.*" (Italics mine.)

Surely that passage does not hold that neither county can tax its own citizens for a necessary bridge across a boundary, but that neither can be *compelled* (by the *Circuit Court*, of course), to tax its citizens unless the Statute is followed.

The opinion in the Nelson County case proceeds:

". . . . . in no event . . . . could the Circuit Court, under the law, have awarded a peremptory mandamus for any other purpose than to compel the . . . Nelson County Court *to appoint Commissioners* . . . After they had . . . instituted a proceeding by mandamus to compel Nelson County to "do what she ought to have done, and what she had failed to do;" to-wit, to appoint three Commissioners. The Justices of Washington County should have paused, and taken no other steps until after hearing and final judgment."

Evidently meaning, that, if Washington County expected to

compel Nelson County to help build the bridge, it must follow the Statutes and after applying to the Circuit Court to require the Nelson County Court to appoint Commissioners, stop until the final judgment ordering such appointment was made and the Commissioners were appointed.

The opinion shows that the Washington County Commissioners had not waited for the action of Nelson, but had contracted for the building of the whole bridge. And the latter part of the opinion speaks of Washington County's "*contract*" in a way which shows that it did not occur to the Court that Washington County could not make a contract for the whole bridge. This is not very material, but seems to be more significant for plaintiffs in error, than anything in that opinion is for Bullitt County.

It must be cold law, reluctantly administered, which will hold that a bridge determined by the proper tribunal to be a necessary public bridge for Bullitt County, is not a County bridge, nor a "necessary public bridge," within the Statute, if the northern end touches Jefferson County, even though Bullitt owned the necessary easements at the Jefferson County end.

The plaintiffs in error pray that the judgment of the Circuit Court be reversed and the action remanded for trial upon the cause of action set forth in the proceedings.

Respectfully submitted,

AUGUSTUS E. WILLSON,
*For Plaintiffs in error.*

JAMES HARLAN,
*Of Counsel.*

Marsh v Fulton 10. Wall. 684.
Hitchcock v Galveston 96. U.S. 341
La v Wood 102 " 294
Chapman v Co 107 " 348
Pimento v City 21. Cal 362

# Supreme Court of the United States,

## OCTOBER TERM, 1883.

W. T. WASHER'S ASSIGNEES, ET AL., - - - - Plaintiffs in Error,

vs. No. 241.

BULLITT COUNTY, - - - - - - - - - - - - - Defendant in Error

## BRIEF FOR DEFENDANT IN ERROR.

James Speed,
F. P. Straus,
Eli H. Brown,
of Counsel.

By D. M. RODMAN.

# Supreme Court of the United States,

**OCTOBER TERM, 1883.**

*W. T. Washer's Assignees, et al.*, - Plaintiffs in Error,

vs. NO. 241.

*Bullit County*, - - - - - - Defendant in Error.

## Brief for Defendant in Error.

### STATEMENT OF CASE.

The plaintiff in error brought this action to recover from Bullitt county, the defendant in error, a balance of $3,184.39, claimed to be due them by said county for the balance of the whole cost of building a bridge over Pond Creek, which is the dividing line between the counties of Bullitt and Jefferson in the State of Kentucky; and $500 for damages for the alleged violation of the contract on the part of the county—the whole amount claimed in the original petition being $3,684.39. The petition shows that plaintiffs in error contracted with J. W. Ridgeway, a commissioner on the part of Bullitt county, for the whole cost of the bridge over the creek, though the Statute of the State of Kentucky requires the work to be contracted for by commissioners of both counties jointly, and the cost thereof paid by a levy of the cost of the work on the two counties in proportion to the number of tithables in each county. General Statutes of Kentucky, sections 36 and 37, chap. 94, page 767. The contract shows that it was drawn in view of this Statute contemplating a joint liability.

The whole cost of the work was $5,325.14, of which $340.75

was due to persons other than plaintiffs, and of this sum it appears from the petition that Bullitt county had levied a tax for, and had paid the sum of $1,800, and which sum the plaintiffs in error admit they have received.

The petition does not show what part of the cost of said work was payable by Bullitt county, nor what part was payable by Jefferson county. It does allege, however, that Bullitt county had, by its said commissioner, agreed and bound itself to pay Jefferson county's proportion in these words: "It is understood that the county of Jefferson is to pay her proportionate part for the erection of said bridge, but the first party (Bullitt county) guarantees the payment of the whole work to the second party."

Nor is there any allegation in said petition that there had been any action whatever taken by Jefferson county either to contract or pay, or that said county had ever refused to appoint commissioners, contract or pay.

To this petition a demurrer was interposed and sustained. Leave was given to amend, and the plaintiffs tendered an amended petition in which they allege that Bullitt county had appointed commissioners to confer with like commissioners from Jefferson county; that they had met and conferred together but could not and did not agree upon a plan for erecting said bridge; that the Bullitt County Court after exhausting all means provided by statute for securing the aid of Jefferson county decided to erect said bridge. The amended petition then recites the various orders of the Bullitt County Court, whereby Ridgeway was appointed commissioner, and the orders levying taxes to pay for the work. It is nowhere shown that Ridgeway, the commissioner, was specially authorized to bind Bullitt county to pay Jefferson county's part of the work, but the two orders of court whereby at one time $1,200, and at another time $600, were appropriated to be paid to plaintiffs, are alleged with a view to show a ratification of the contract that said Commissioner Ridgeway did make, it being alleged that the county knew of the contract when it made the orders to pay plaintiffs the $1,800.

The plaintiffs then proceeded to "withdraw," as they term it, certain allegations and admissions made in the original petition, which admissions are that there is a balance due them of only $3,184.39; that the sum of $340.75 had been assumed by the county to be by it paid to the Smith Bridge Company, and that the plaintiffs had been damaged in the sum of $500, and the amended petition then closes with a prayer for judgment for $5,325.14, and for their costs.

It is not alleged in this amended petition, however, that the admission of the payment of the $1,800 by the county had been made by mistake, and they give no reason whatever why the allegations are withdrawn.

To this petition as amended the defendant demurred; the demurrer was sustained. The Court (Hon. H. B. Brown, Judge) rendered an opinion which is found on page 26, of the record, and, the plaintiffs failing to plead further, their petition was dismissed and they prosecute this writ of error, which we insist should be dismissed for want of jurisdiction.

We make these points of law, to-wit:

1. That the amount in controversy, being less than $5,000, as shown in the whole case, this Court has not jurisdiction of the writ of error.

2. That the County Court of a Kentucky county cannot bind the county for the cost of a bridge, a part of which is beyond the county limits, nor guarantee another county's share thereof, unless authorized to do so by express legislative enactment.

1. First as to

## JURISDICTION.

The petition as amended shows that the whole claim is $5,325.14, for which no interest is claimed, (see prayer of amended petition, page 23, Rec.), but the payment of $1,800 being admitted, the amount involved is less than $5,000, which takes the case out of the jurisdiction of this court.

In an action on a contract where the pleadings show that noth-

ing more than the debt with the legal interest thereon can be recovered, and that when so computed the sum cannot by any legal possibility reach the jurisdictional amount, the court cannot entertain jurisdiction though the plaintiff may in the prayer of his petition claim a sum in excess of the jurisdictional amount.

Cooke vs. Woodruff, 5 Cranch, 13.

Lee vs. Watson, 1 Wall, 337

Shackler vs. Fire Ins. Co., 93 U. S., 241.

Tintsman vs. Nat. Bk., 100 U. S., 6.

Conkling's Treatise, p. 64 3d ed.

Banking Association vs. Insurance Association, 102 U. S., 121.

Gray vs. Blanchard, 97 U. S., 564.

Sewell vs. Chamberlain, 5 Howard, 6.

In the case last name where the demand was susceptible of computation, and by no legal possibility could it be adjudged to be the jurisdictional amount, it was held that no appeal would lie.

In the case at bar the plaintiff's demand cannot by any legal possibility exceed $5,000 after the $1,800 credit admitted in the petition is allowed.

The amended petition withdraws that part of the petition which admits the $1,800 payment, but it does not show that the payment was never made and was admitted by mistake. The plaintiff cannot, by saying in an amended petition that a certain allegation in a former petition is withdrawn, destroy the effect of an admission contained therein. This is especially the case when the amended petition relies upon the levy orders by which that payment was made as a ratification of the contract sued upon.

The petition and the amendment thereto are to be construed together, and if no defense had been interposed plaintiff by no legal possibility could have recovered judgment for exceeding $3,184.39, and $340.75 with legal interest thereon from the 10th day of December, 1878, which could not, if calculated to this time, amount to $5,000.

But no reason is given why the $340.75 should be withdrawn from the effect of the allegations in the original petition, where it is alleged that the Smith Bridge Company had agreed to release the plaintiff, and look to the county. It is not alleged in the amended petition that this is not so, but plaintiffs simply say they withdraw that allegation because the county denies it. This is not sufficient to annul such an agreement.

We regard this point as authoritatively settled by the case of Lee vs. Watson, 1 Wall, 337. In that case a party was allowed by the Circuit Court to amend the prayer of his declaration by claiming therein damages for $2,100 instead of $800 as claimed in the declaration, while the body of the declaration showed that he was not entitled to as much as $2,000 by any legal possibility. In disposing of the case the Court says: "When the amount alleged to be due in the body of the declaration is less than $1,000 an amendment merely in the matter of amount of damages claimed so as to exceed $2,000, (then the jurisdictional amount), will not give jurisdiction to this Court and enable it to review the final judgment in the case." The court distinctly held that it would look, not alone to the prayer of the declaration, but also to the body thereof, to see if the demand could legally amount to a sum sufficient to give the court jurisdiction.

The petition admits that $1,800 has been paid in two payments —$1,200 and $600 each. The amended petition avers that two tax levies have been made by the Bullitt County Court to pay for this very work, and failing to aver that the $1,800 was not paid, or that they failed to get the proceeds of the two levy orders, the conclusion, it seems to us, is irresistible that the whole amount claimed in the prayer of the amended petition, to-wit $5,325.14, must be credited by the $1,800 admitted in the petition.

Counsel for plaintiff in error will doubtless rely upon the case of Wilson vs. Daniel, 3 Dallas, 401, s. c. in 2 Dallas, 360 n., where the court held that in an action upon a bond in the penalty of $60,000 to be discharged by the payment of $1,800 the court had jurisdiction.

But this case has been overruled by the case of Lee vs. Watson, supra, and also by the case of U. S. vs. McDowell, 4 Cranch, 316. See comments of the author in Conkling's Treatise, p. 64, 3d ed.

It is impossible to conceive why the plaintiff should withdraw the admission of the payment of the $1,800, when he is at the same time trying to use the levy orders by which that payment was made as a ratification of the contract sued upon unless it be done with a view to give this court jurisdiction.

Second. The County Court of a Kentucky county cannot tax its citzens to build a bridge, or bind them for the cost thereof, beyond the county limits, except by express statutory authority.

Bowling Green & Madisonville R. R. Co. vs. Warren County Court, 10 Bush, Ky. R., 718.

Campbell County Court vs. Taylor, 8 Bush, 206.

Dillon Municipal Corporation, 104.

The power to build a bridge with another county is something extra municipal and requiring express legislative authority to do it. The Kentucky statute therefore pointed out a definite way in which it could be done, (Sections 36 and 37, Chapter 94, General Statutes of Kentucky, p. 767), which are in substance that where one county decrees it advisable to do this its County Court shall appoint a Commissioner to confer with a like Commissioner to be appointed by the County Court of the adjoining county, who shall meet and agree on the plan, make the contract, and when done the cost thereof is to be levied by the respective County Courts on each county "in proportion to the number of tithables in each county." If one County Court refuses without good reason to appoint a Commissioner to confer, &c., the county desiring the bridge may apply to the Circuit Court of the recusant county, and the duty, if it be one, may be compelled by mandamus. The Circuit Court is made the arbiter between them. Garrard County Court vs. Boyle County Court, 10 Bush, p. 208. The action required is joint, and neither can be held liable unless the statute is pursued requiring them to act together. Nelson County vs. Washington County County, 14 B. Monroe, 92.

In the case last cited Washington county wanted a bridge across a river or creek dividing it from Nelson county, and appointed a Commissioner to confer with Nelson county and at the same time requested the County Court of Nelson to act in the matter which it refused to do. Without waiting for Nelson county, the Washington county Commissioners proceeded to contract with Carothers & Applegate for a $6,000 bridge and sued Nelson county to compel that county to pay its share, but the Court of Appeals on a final hearing of the case held that neither county was liable unless the statute was strictly complied with, using this language: "For as the law is understood by this court, until such joint commission is constituted to act in obedience to the requisitions of the statute, neither of the counties is bound; nor can either be compelled to tax their citizens in any way to raise the money to build the bridge."

This case arose under the act of 1797, but it is substantially the same as the present law in the General Statutes, and must be considered an authoritative construction of the present law.

There is no provision in the statute whereby one county can build the bridge and put the whole cost upon its own citizens, but the provision is clear that the cost must be levied upon the two counties in proportion to the number of tithables.

The reason for this is apparent. A county has no right to send its agents to act beyond its territorial limits to erect the abutments of a bridge, or to execute process. For instance, if process is to be executed in another county it must be sent there. It is only in certain cases, provided for by statute, that an officer of one county can execute process in another county.

Then, again, what would be the use of building a bridge into another county unless that other county in some way co-operated as by building a road to it?

The reason and good sense of this is made apparent from the plaintiff's situation. Instead of waiting for Jefferson County's action, or until Bullitt County could compel its action, he has pro-

ceeded in his folly of contracting with one commissioner alone until he has put himself into a situation where he is without remedy for the proportionate share which ought to have been paid by Jefferson County. The fact cannot be disguised that Bullitt has paid more than her share while the work done is of no benefit whatever to her citizens.

This is an attempt to recover from Bullitt county the share of Jefferson county for building this bridge upon the alleged guaranty in the alleged contract. The magnitude of this undertaking on the part of Bullitt county will be apparent when the court is reminded of the fact that Jefferson county contains the city of Louisville, the metropolis of the State, and has near 30,000 tithables, while Bullitt is a small county about half the size of Jefferson in territory and with about 1,400 tithables.

The fact appears in the petition that a Commissioner was appointed by Jefferson county, but he could not or would not agree to a contract. When this fact is taken in connection with the statute and the form of the contract, showing that it was contemplated that Jefferson county was to join, there can be no doubt that the contract is incomplete, aud therefore void for any purpose. The statute was not pursued and the contract is therefore ultra vires and void. Campbell County Court vs. Taylor, 8 Bush, 206.

In this connection we call attention to the facts alleged concerning the execution of the contract sued upon. It is alleged that the County Court of Bullitt, by Commissioner duly authorized, etc., made and entered into the contract, etc., etc. By the Kentucky Statute the County Court is composed of the presiding judge and the Justices of the Peace, of whom it requires a majority to transact the business of the county. Thus—

"A majority of whom shall constitute a quorum for the transaction of business, which shall be confined to laying the county levy, appropriating money and transacting other financial business of the county." Act XVII., Sec. 1, Chap. 28, General Statutes of Kentucky.

"The County Court is a Court of record." Sec. 5, same article.

"The records of the County Court shall at all times show by whom the court is holden. When Justices of the Peace compose a part of the court the records must state the names of those who take their seats; and when a member leaves the bench his absence must be noted." Sec. 9, same article.

The reason for these prerequisites is that when generally referred to in the Statutes as to all matters, except where taxation is concerned, the County Judge alone composes the County Court; but when taxation is involved, or contracts which may lead to it, the records must show that it is the legislative body composed of the Justices. A County Court can only speak by its record. Fletcher, 2 Leight and 4 Bush, (Ky.) R., p. 306.

By section 1 of article 3, chap. 27, it is provided "that the County Court, unless composed of a majority of the Justices of the Peace of said county in commission, shall not have power to make appropriations of the county levy or revenue, or to make any charge thereon greater than $50 for any one object."

We claim then that this petition is insufficient in not showing affirmatively (1) that this alleged contract was made or authorized by the record of the Bullitt County Court, and (2) in not showing by the record when that contract was made or authorized that it was by the County Court composed of a majority of the Justices. When reference is made to the County Court it is understood as a court composed of a County Judge alone. 10 Bush, 717.

The appointment of Ridgeway, the Commissioner, should then be considered as having been made by the County Judge alone, unless the contrary be shown. But that court could not bind the county for exceeding $50. Such an extraordinary proceeding as becoming surety for a neighboring county would, under the Kentucky Statutes, require an order of court, and that order of court is required by Statute to show who composed it.

The powers and jurisdiction of this court, sometimes called the Levy Court, sometimes the Court of Claims, is fully discussed in

the opinion of the ~~laws~~ could in the case of the Railroad vs. Warren County Court, 10 Bush, and to that we refer. The sections of the Statute are fully set out there.

The presumption is, unless otherwise shown by the record, that the order appointing Ridgeway commissioner was made by the County Court held by the County Judge alone.

This applies to all the orders except the levy orders, for there the amended petition shows levys were made by a court composed of a majority of the Justices.

But we are not left to construction. The amended petition shows that the County Judge alone made the order appointing Ridgeway and empowering him to act. See amended petition, page 20, Record.

Now we have a decision clearly in point, that the County Court cannot make such an order so as to bind the county. This was a preliminary step towards creating a large liability on the part of Bullitt county, and in the case of Railroad vs. Warren County Court, above cited, the Kentucky Court of Appeals held that such an act as submitting a proposition to the voters of the county to subscribe for stock in a railroad, "was a preliminary step toward creating an indebtedness by the county * * * * * * * and the right to impose a tax for county expenditures, or to create liabilities on the county for the payment of which a tax becomes necessary is peculiar to the County Court composed of the County Judge and Justices."

To avoid the effect of this case the levy orders made by the court a majority of the Justices setting are set out in the amended petition to show that Bullitt county has ratified the contract sued on.

It could not ratify that part of the contract which binds that county to pay Jefferson county's proportion, and these orders must be taken to have had reference solely to Bullitt county's proportionate share which was all that the County Court could make that county liable for.

The authorities cited to show that the contract could not be originally made are just as applicable to the alleged ratification.

A principal may adopt or ratify the unauthorized act of his agent, but we have yet to see it stated or held that an agent can make valid his own unauthorized acts. If such a doctrine be admitted, all delegated power, however strictly limited, would become as broad as the agent chose to make them.

The learned counsel for plaintiffs relies upon the case of Gilman vs. Contra Costa County, 5 Cal., 426.

The case should not be considered authority here because the opinion does not show the California Statute; does not even show that one is involved. But this question could not have arisen because upon looking at a map of California we find that the city of Oakland, where the bridge was built, was wholly within Contra Costa county, whose authorities built it, and their authority must have been co-extensive with the county. The court decided that they could build the bridge "if public convenience required it," and it must be presumed that the county could build bridges within its limits where the public convenience required it. The Kentucky cases being directly in point, must, as we contend, govern, and as they show that the County Court of Bullitt county could not, in such a case as set out in the petition as amended, ~~only~~ not become surety for Jefferson county's share, but that it could not even make Bullitt county liable for its proportionate share, whatever that may be, the court must follow these cases, and affirm the case, which we ask to be done unless the court should dismiss it for want of jurisdiction.

Respectfully submitted.

D. M. RODMAN,
For defendant, Bullitt Cotuny.

JAMES SPEED,
F. P. STRAUS,
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## AUTHORITIES CITED AS TO JURISDICTION.

Conkling's Treatise, p. 64, 3d Ed.
Lee vs. Watson, 1 Wall., 337.
Shacker vs Fire Insurance Co., 93 U. S., 241.
Tintsman vs National Bank, 100 U. S., 6.
Sewell vs. Chamberlain, 5 How., 6.
U. S. vs. McDowell, 4 Cranch; 316.
18 Statutes U. S., 316.
Bank vs. Ins. Co., 102 U. S., 121.
Gray vs. Blanchard, 97 U. S., 564.

## AS TO THE LAIBILITY OF THE COUNTY.

General Statutes Kentucky, pp. 305, 667. Art. 3, chap, 27.
R. R. Co. vs. Warren County Court, 10 Bush, 718.
Campbell County Court vs. Taylor, 8 Bush, 206.
Dillon Municipal Corporations, 104.
Garrard County Court vs. Boyle County Court, 10 Bush, 208.
Washington County Court vs. Nelson County Court, 14 B. Monroe, 92.
Fletcher vs. Leight, &c., 4 Bush, 306.